Supreme Court, U.S.
FILED

CASE NO. 00-362 AUG 2 3 2000
OFFICE OF THE CLERK

In The
SUPREME COURT
Of The
UNITED STATES

October Term, 1999

FERNANDO GALINDO DEL VALLE,

Petitioner,

vs.

THE ATTORNEY GENERAL,
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

ALFONSO M. SALDANA
One Brickell Square
801 Brickell Avenue
Suite 900
Miami, Florida 33131
(305) 371-0066
Counsel For Petitioner

18pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DISMISSED PETITIONER'S PETITION FOR REVIEW BECAUSE PETITIONER POSSESSED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 440(d) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA)?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED ..... i.
TABLE OF CONTENTS ..... ii.
TABLE OF AUTHORITIES ..... iii.
JUDGMENT AND OPINION OF THE COURT BELOW 2
STATEMENT OF JURISDICTION 2
CONSTITUTIONAL PROVISION INVOLVED 2
STATEMENT OF THE CASE:
PROCEDURAL BACKGROUND 3
STATEMENT OF THE FACTS 3
BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE 3
REASON FOR GRANTING THE WRIT:
THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DISMISSED PETITIONER'S PETITION FOR REVIEW BECAUSE PETITIONER POSSESSED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 440(d) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA) 3-4
CONCLUSION 5

TABLE OF AUTHORITIES

Cases Page(s)

Allen v. Wright, 468 U.S. 737 (1984) 4

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4

Statutes

Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 440(d), 110 Stat. 1214, 1277 (1996) 4

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C, tit. III, Pub. L. 104-208, 304(b), 110 Stat. 3009-546, 3009-597 (1996) 4

CASE NO.

In The
SUPREME COURT
Of The
UNITED STATES

October Term, 1999

FERNANDO GALINDO DEL VALLE,

Petitioner,

vs.

THE ATTORNEY GENERAL,
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Fernando Galindo Del Valle, prays a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Eleventh Circuit dismissing Petitioner's Petition For Review in a removal case for lack of jurisdiction.

I. JUDGMENT AND OPINION OF THE COURT BELOW

In a per-curiam opinion dated May 26, 2000, Eleventh Circuit Court of Appeals dismissed Petitioner's Petition For Review of the Board of Immigration Appeals affirmance of an Immigration Judge's final order to remove Petitioner from the United States. No Petition For Rehearing was filed. Accordingly, the opinion of the Eleventh Circuit Court of Appeals stands final. The jurisdiction of the Eleventh Circuit Court of Appeals was invoked pursuant to Title 8 U.S.C. 1252(b).

II. JURISDICTION OF THIS COURT

The opinion and judgment of the Eleventh Circuit Court of Appeals of the United States to be reviewed by this Honorable Court was issued on May 26, 2000. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. 1254(1) and this Court's Rules 10 through 16.

III. CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENCE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE WITHOUT JUST COMPENSATION.

IV. STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On October 22, 1998, removal proceedings were held in Miami, Florida. The Honorable Neale S. Foster determined that Petitioner was removable from the United States because of a prior drug related criminal conviction. The Board of Immigration Appeals affirmed the ruling of the Immigration Judge and the Eleventh Circuit dismissed Petitioner's Petition For Review for lack of subject-matter jurisdiction.

STATEMENT OF THE FACTS

Petitioner has been a permanent resident of the United States since 1969. On August 31, 1998 the Immigration and Naturalization Service commenced removal proceedings against Petitioner. Petitioner admitted that he was convicted of Importation of Methaqualone on December 18, 1981. Petitioner was paroled on August 8, 1984. The Immigration Judge found that Petitioner was not entitled to any relief and ordered Petitioner removed from the United States.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The Immigration Judge was vested with jurisdiction pursuant to Title 8 U.S.C. 1229a(a)(1) (INA 240), 8 C.F.R. 3.10, and 8 C.F.R. 240.1(a)(1).

V. REASON FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED WHEN IT DISMISSED PETITIONER'S PETITION FOR REVIEW BECAUSE PETITIONER POSSESSED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 440(d) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA).

In its opinion, the Eleventh Circuit Court of Appeals held that Petitioner did not have standing to challenge the constitutionality of AEDPA 440(d) since AEDPA 440(d) was not applied to Petitioner to bar INA 212(c) discretionary relief because INA 212(c) had already been repealed by the permanent rules of the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996 (IIRIRA) in existence at the time of Petitioner's proceedings. Accordingly, the Eleventh Circuit Court of Appeals held that Petitioner could not show an injury from the application of AEDPA 440(d) and thus lacked standing. Appendix at pg. 6. In so holding, the Eleventh Circuit committed error.

The doctrine of standing contains three elements: 1) the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is concrete and particularized and actual or imminent; 2) there must be a causal connection between the injury and the conduct complained of; and, 3) it must be as likely as opposed to merely speculative that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Furthermore, the requirement of standing has a core component-a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. Allen v. Wright, 468 U.S. 737, 751 (1984). With these principles in mind, it becomes apparent that Petitioner possessed standing to challenge AEDPA 440(d).

It was AEDPA 440(d) that first eliminated INA 212(c) discretionary relief for aliens convicted of drug offenses. See, Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 440(d), 110 Stat. 1214, 1277 (1996). The permanent rules of IIRIRA repealed INA 212(c) in its entirety. See, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C, tit. III, Pub. L. 104-208, 304(b), 110 Stat. 3009-546, 3009-597 (1996). Although IIRIRA's permanent rules repealed INA 212(c) in its entirety, IIRIRA merely continued the elimination of 212(c) relief already in effect for aliens convicted of drug offenses.

Accordingly, Petitioner suffered an "injury in fact" by the application of AEDPA 440(d)'s repeal of 212(c) relief for drug offenses since it was AEDPA 440(d) that eliminated the possibility of 212(c) relief for Petitioner in the first place. IIRIRA merely continued this repeal. Thus, the Eleventh Circuit Court of Appeals has misapplied this Honorable Court's precedents on the issue of standing and has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

VI. CONCLUSION

WHEREFORE, based on the foregoing arguments and citations of authority therein, it is respectfully requested that this Petition be granted and that this Honorable Court remand this matter to the Eleventh Circuit Court of Appeals for a consideration of the merits of Petitioner's challenge to AEDPA 440(d).

Respectfully Submitted,

Alfonso M. Saldana
One Brickell Square
801 Brickell Avenue
Suite 900
Miami, Florida 33131
(305) 371-0066

Counsel For Petitioner

CASE NO.

In The
SUPREME COURT
Of The
UNITED STATES

October Term, 1999

FERNANDO GALINDO DEL VALLE,

Petitioner,

vs.

THE ATTORNEY GENERAL,
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

APPENDIX

ALFONSO M. SALDANA
One Brickell Square
801 Brickell Avenue
Suite 900
Miami, Florida 33131
(305) 371-0066

Counsel For Petitioner

INDEX TO APPENDIX

Page(s)

United States Court of Appeals Eleventh Circuit
Opinion Dated May 26, 2000 1-7

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11424

Agency Docket No. A 18 240 935

FERNANDO GALINDO-DEL VALLE,

Petitioner-Appellant,

versus

THE ATTORNEY GENERAL,
IMMIGRATION & NATURALIZATION SERVICE,

Respondents-Appellees.

Petition for Review of a Final Order of the
Board of Immigration Appeals

Before COX, Circuit Judge, GODBOLD and MESKILL *, Senior Circuit Judges.

PER CURIAM:

---

* Honorable Thomas J. Meskill, Senior U.S. Circuit Judge for the Second Circuit, sitting by designation.

I. Introduction

Fernando Galindo-Del Valle petitions for review of the Board of Immigration Appeals' affirmance of an immigration judge's final order to remove Galindo-Del Valle from the United States. Galindo-Del Valle argues that section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA) is unconstitutional as applied to him and that he should be entitled to relief from deportation. The Attorney General and the Immigration and Naturalization Service (collectively, the INS) have moved to dismiss Galindo-Del Valle's petition for lack of subject-matter jurisdiction. We conclude that we lack subject-matter jurisdiction and, therefore, dismiss Galindo-Del Valle's petition.

II. Facts

Galindo-Del Valle, a Colombian citizen, became a legal resident of the United States on November 29, 1969. On December 18, 1981, Galindo-Del Valle pleaded guilty to conspiracy to import a large quantity of methaqualone tablets, in violation of 21 U.S.C. § 952(a), and was sentenced to five years' imprisonment. The INS took no action against Galindo-Del Valle until he attempted to reenter the United States as a returning resident alien on August 30,1998. The following day, the INS initiated removal proceedings. Because these proceedings commenced after April 1, 1997, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), this case is governed by IIRIRA's permanent rules, INA § 242, codified at 8 U.S.C. § 1252 (Supp. 111996). *See Innab v. Reno*, 204 F.3d 1318, 1321 n.5 (11th Cir. 2000).

III. Procedural History

After a hearing, an immigration judge (IJ) ordered Galindo-Del Valle removed from the United States for two reasons. First under INA § 12(a)(2)(A)(i)(11), Galindo-Del Valle was an alien who had been convicted of conspiracy to violate a controlled-substance law of the United States. *See* 8 U.S.C. § 1182(a)(2)(A)(i)(II) (Supp. II 1996). Second, under INA § 212(a)(2)(C), an immigration officer knew or had reason to believe that Galindo-Del Valle had knowingly conspired in the illicit trafficking of a controlled substance. *See* 8 U.S.C. § 1182(a)(2)(C) (Supp. II 1996). During

the hearing, the IJ also noted that Galindo-Del Valle's conviction was for a particularly serious crime, making him an aggravated felon.

Galindo-Del Valle appealed the IJ's decision to the Board of Immigration Appeals (BIA). The BIA affirmed that Galindo-Del Valle was not admissible to the United States for the same two reasons stated by the IJ. The BIA also noted that Galindo-Del Valle's conviction qualified as an aggravated felony, as defined by INA § 101(a)(43)(B), and that Galindo-Del Valle was therefore ineligible for withholding of removal under INA § 241 (b)(3). *See* 8 U.S.C. § § 110 1 (a)(43)(B) and 123 1 (b)(3) (Supp. II 1996). Finally, the BIA noted that it lacked jurisdiction to address constitutional challenges to the applicable statutes and implementing regulations. Galindo-Del Valle did not argue before the U or the BIA that equitable considerations prevented his removal or that he should have been permitted to seek asylum or withholding of removal.

Galindo-Del Valle filed a petition for review in this court. See 8 U.S.C. § 1252 (Supp. II 1996).

IV. Contentions of the Parties

Galindo-Del Valle contends that AEDPA § 440(d), which amended the INA to bar aliens convicted of certain criminal offenses from applying for discretionary relief from deportation, is unconstitutional as applied to him. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 440(d), 110 Stat. 1214-1277 (1996). He argues that at the time of his 1981 conviction, he would have been eligible to apply for discretionary relief from deportation under former-INA § 212(c). *See* 8 U.S.C. § 1182(c) (1994).[1]

Therefore, according to Galindo-Del Valle, AEDPA § 440(d) took away his right to apply for relief, violating his constitutional rights to substantive and procedural due process. Galindo-Del Valle also contends that AEDPA is not to be given retroactive effect.

[1] AEDPA's amendment to former INA § 212(c) eliminated the possibility of discretionary relief for aliens convicted of drug offenses. See Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996). The permanent rules of IIRIRA repealed INA § 212(c) in its entirety. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C, tit. III, Pub. L. 104-208, § 304(b), 110 Stat. 3009546, 3009-597 (1996).

Galindo-Del Valle also argues that equitable considerations regarding his cooperation with the government regarding the 1981 conviction should prevent the INS from removing him, or at least qualify him for asylum or withholding of removal under current law. *See* 8 U.S.C. §§ 1158 and 1231(b)(3) (Supp. II 1996). First, because he cooperated with the government, the government should be estopped from using that case as a basis for his removal. Second, his cooperation with the government made him a "snitch," making it more likely than not that he would be persecuted in Colombia because of his membership in that particular social group and causing his well-founded fear of persecution in Colombia. Accordingly, he should have been given the opportunity to seek asylum or withholding of removal.

Finally, Galindo-Del Valle argues that if INA § 242(a)(2)(C) limits our jurisdiction to review a final order of deportation to determine only substantial constitutional questions and whether the threshold requirements of the statute are satisfied, the statute is unconstitutional.

The INS contends that we lack jurisdiction to review the final order of deportation against Galindo-Del Valle. Under INA § 242(a)(2)(C)'s plain language, a court is permitted to review only the threshold issues of whether Galindo-Del Valle is (1) an alien (2) who is removable (3) based on a conviction for an offense enumerated in the statute. *See* 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996). This court's jurisdiction to review the final order of removal disappears once these three things have been established.

The INS concedes that the court would also have jurisdiction to review a substantial constitutional claim bearing on Galindo-Del Valle's removability, but contends that he has not raised such a claim in this case. Furthermore, according to the INS, the court lacks jurisdiction to consider Galindo-Del Valle's arguments concerning his eligibility for relief under now-repealed INA § 212(c) and his related estoppel claims because Galindo-Del Valle did not raise them during the administrative process, as required by INA § 242(d)(1). See 8 U.S.C. § 1252(d)(1) (Supp. II 1996). The INS also contends that Galindo-Del Valle was never eligible for former-INA-§ 212(c) relief because he was placed in removal proceedings

after IIRIRA's effective date.

Finally, the INS contends that the court lacks jurisdiction to address Galindo- Del Valle's asylum and withholding-of-removal claims because he did not present them during the administrative process, and he has not argued that these claims relate to the three threshold issues over which the court has jurisdiction or raise a substantial constitutional question. Even if the court could address these claims, because Galindo-Del Valle committed an aggravated felony (or a "particularly serious crime"), he is ineligible for asylum and withholding of removal. See 8 U.S.C. §§ 115 8(b)(2)(A)(i), (B)(i), and 123 1(b)(3)(B) (Supp. II 1996).

V. Discussion

Under INA § 242(a)(2)(C), our jurisdiction to review a final order of removal against criminal aliens is very limited. See 8 U.S.C. § 1252(a)(2)(C) (Supp. II 1996) ("no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [enumerated criminal offenses]."). Under INA § 242(a)(2)(C)'s plain language, we have jurisdiction to determine only whether Galindo-Del Valle is (1) an alien (2) who is removable (3) based on a conviction for an offense enumerated in the statute. See id.; Le v. US. Attorney General, 196 F.3d 1352, 1353 (11th Cir. 2000). If these three conditions are satisfied, our jurisdiction over Galindo-Del Valle's petition for review of the final order of removal disappears. See Le, 196 F.3d at 1354. Galindo-Del Valle admitted at his hearing before the IJ that he is a Colombian citizen who pleaded guilty to conspiracy to import methaqualone. Thus, he is "an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) . . ." and INA § 242(a)(2)(C) strips us of jurisdiction to review the final order of removal. 8 U.S.C. § 1252(a)(2)(C); see also 8 U.S.C. § 1182(a)(2)(A)(i)(II) (Supp. II 1996).

This conclusion does not mandate dismissal of his petition, however, because we have determined that, despite INA § 242(a)(2)(C), we retain jurisdiction to evaluate constitutional challenges to the INA. *See Richardson v. Reno*, 180 F.3d 1311, 1316 n.5 (11th Cir. 1999) (noting that INA § 242(a)(2)(C) "does not foreclose constitutional challenges to

the statute itself or other substantial constitutional issues from being raised in the court of appeals"), *cert. denied*, - U.S. -, 120 S. Ct. 1529 (2000). Galindo-Del Valle challenges the constitutionality of AEDPA § 440(d), the amendment that made aliens convicted of certain criminal offenses ineligible to apply for discretionary relief under former INA § 212(c). If the INS had commenced proceedings against Galindo-Del Valle while AEDPA § 440(d) was in effect, discretionary relief under former INA § 212(c) would have been unavailable to him because of his drug conviction. However, the INS did not commence proceedings against Galindo-Del Valle until after IIRIRA's permanent rules had repealed former INA § 212(c) in its entirety. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, div. C, tit. III, Pub. L. 104-208, § 304(b), 110 Stat. 3009- 597(1996).

Galindo-Del Valle has not challenged the constitutionality of IIRIRA's repeal of former INA § 212(c). Instead, he attempts to challenge the constitutionality of AEDPA § 440(d). But AEDPA § 440(d) was not applied to Galindo-Del Valle to bar INA § 212(c) discretionary relief because INA § 212(c) had been repealed. Thus he cannot show an injury from the application of AEDPA § 440(d). We conclude, therefore, that he lacks standing to challenge its constitutionality. [2] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 2136 (1992) (noting that to satisfy Article III's standing requirements, a plaintiff must show that, among other things, he has suffered an "injury in fact"). We thus conclude that we lack jurisdiction to evaluate Galindo-Del Valle's constitutional challenge to AEDPA § 440(d).

Galindo-Del Valle also challenges the final order of deportation on equitable grounds and argues that he should have been permitted to apply for asylum and withholding of removal. The problem with these arguments, as pointed out by the INS, is that they were not raised in the

[2] Standing, of course, is an element of the constitutional requirement of "case or controversy," and the lack of standing deprives a court of subject-matter jurisdiction. See In re Weaver, 632 F.2d 461, 463 n.6 (5th Cir. 1980). We are, of course, obligated to inquire into subject-matter jurisdiction sua sponte whenever it may be lacking. See University of South Alabama v. The American Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999).

administrative proceeding. Under INA § 242(d)(1), "[a] court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right. . . ." 8 U.S.C. § 1252(d)(1) (Supp. II 1996). Because Galindo-Del Valle failed to raise these arguments before the IJ and the BIA, we lack jurisdiction to address them.

Finally, we note that Galindo Del-Valle attempts to challenge the constitutionality of INA § 242(a)(2)(C). That statute, however, has not been applied in this case to restrict our review of the final order to remove Galindo Del-Valle from the United States. Accordingly, we need not reach the question of that statute's constitutionality.

VI. Conclusion

Because we conclude that we lack jurisdiction to address the arguments raised by Galindo-Del Valle, we dismiss Galindo-Del Valle's petition for review.

PETITION DISMISSED.

(2) Supreme Court, U.S.
FILED

CASE NO. 00-362 AUG 23 2000

OFFICE OF THE CLERK

In The
SUPREME COURT
Of The
UNITED STATES

October Term, 1999

FERNANDO GALINDO DEL VALLE,

Petitioner,

vs.

THE ATTORNEY GENERAL,
IMMIGRATION & NATURALIZATION SERVICE,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ALFONSO M. SALDANA
One Brickell Square
801 Brickell Avenue
Suite 900
Miami, Florida 33131
(305) 371-0066

Counsel For Petitioner

5pp

INDEX TO SUPPLEMENTAL APPENDIX

Page(s)

DECISION OF THE BOARD
OF IMMIGRATION APPEALS 1-2

DECISION OF THE IMMIGRATION JUDGE 3

U.S. Department of Justice
Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration

File: A18 240 935-Krome

Date: May 7, 1999

In re: FERNANDO GALINDO-DEL VALLE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joan M. Powers, Esquire
2562 S.W. 8th Street
Sunrise, Florida 33135

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I & N Act [8 U.S.C. 1227(a)(2)(A)(i)(II)]
Controlled substance violation

Sec. 212(a)(2)(C), I & N Act [8 U.S.C. 1227(a)(2)(C)]-
Controlled substance trafficker

In a decision dated October 22, 1998, an Immigration Judge found the respondent subject to removal on the charges set forth above and determined that he is ineligible for relief from removal. The respondent has appealed. The appeal will be dismissed.

The respondent is a native and citizen of Colombia who was accorded residency on November 29, 1969. On December 18, 1981, the respondent was convicted in the United States District Court for the Southern District of Florida for the offense of importation of methaqualone, in violation of 21

U.S.C. 952(a). For this offense, the respondent was sentenced to five years imprisonment (Exhibit 3). On August 30, 1998, the respondent arrived at Miami International Airport seeking admission as a returning resident alien.

The respondent is not admissible to the United States under section 212(a)(2)(A)(i)(II) of the Immigration And Nationality Act, 8 U.S.C. 1182(a)(2)(A)(i)(II), as an alien who has been convicted of a controlled substance violation, and under section 212(a)(1)(C) of the Act, as an alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance.

The respondent's conviction is also an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. 1101(a)(43)(B), as illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c)(2) of title 18, United States Code). Contrary to his claim on appeal, the respondent is ineligible for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. 1231(b)(3), due to his conviction for an aggravated felony. See section 2411(b)(3)(B) of the Act. Despite the respondent's constitutional challenge, this Board does not have jurisdiction to rule upon the constitutionality of the Act and the regulations. See section 103 of the Act, 8 U.S.C. 1103, 8 C.F.R. 3.1 (1998); Liu v. Waters, 55 F.3d 421 (9th Cir. 1995); Matter of Fuentes-Campos, Interim Decision 3318 (BIA 1997); Matter of C-, 20 I & N Dec. 529, at 532 (BIA 1992).

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Miami, Florida

File No.: A 18 240 935 October 22, 1998

In the Matter of

FERNANDO GALINDO DEL VALLE IN REMOVAL PROCEEDINGS

Respondent

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:

Judith Powers Michael Mansfield

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent has admitted, through counsel, that the allegations of fact, as amended, are true and correct. See Exhibits 1, Exhibit 2, and Exhibit 3. There are no further matters before this Court.

ORDER

The Respondent shall be removed from the United States pursuant to the charges set forth in the Notice to Appear under Section 212(a)(2)(A)(i)(2) and Section 212(a)(2)(C) of the Notice to Appear.

NEALE S. FOSTER
Immigration Judge

Supreme Court, U.S.
FILED
DEC 11 2000

(3)

No. 00-362

In the Supreme Court of the United States

FERNANDO GALINDO DEL VALLE, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
MICHAEL T. DOUGHERTY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

2244

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner lacked standing to challenge the Board of Immigration Appeals' supposed application of 8 U.S.C. 1182(c) (1994), as amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1277, to his case, because Congress repealed Section 1182(c) entirely before petitioner was placed in removal proceedings.

2. Whether the court of appeals lacked jurisdiction over petitioner's petition for review of his removal order under 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Discussion	11
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Almon v. *Reno*, 192 F.3d 28 (1st Cir. 1999), cert. denied, 121 S. Ct. 83 (2000)	6
Bowrin v. *INS*, 194 F.3d 483 (4th Cir. 1999)	5
Calcano-Martinez v. *INS*, No. 98-4033, 2000 WL 133661 (2d Cir. Sept. 1, 2000)	14
DeSousa v. *Reno*, 190 F.3d 175 (3d Cir. 1999)	5, 6
Fuentes-Campos, In re, Interim Dec. 3318 (BIA May 14, 1997)	6, 12
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	3
Goncalves v. *Reno*, 144 F.3d 110 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999)	4, 5
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), cert. denied *sub nom. Reno* v. *Navas*, 526 U.S. 1004 (1999)	4, 5
Jurado-Gutierrez v. *Greene*, 190 F.3d 1135 (10th Cir. 1999), cert. denied *sub nom. Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000)	5, 6
LaGuerre v. *Reno*, 164 F.3d 1035 (7th Cir. 1998), cert. denied, 120 S. Ct. 1157 (2000)	5, 6
Magana-Pizano v. *INS*, 200 F.3d 603 (9th Cir. 1999)	5
Mattis v. *Reno*, 212 F.3d 31 (1st Cir. 2000)	5
Max-George v. *Reno*, 205 F.3d 194 (5th Cir. 2000), petition for cert. pending, No. 00-6280	15
Mayers v. *INS*, 175 F.3d 1289 (11th Cir. 1999)	5

Cases—Continued: Page

Pak v. *Reno*, 196 F.3d 666 (6th Cir. 1999) 5
Requena-Rodriquez v. *Pasquarell*, 190 F.3d 299 (5th Cir. 1999) 5-6
Richards-Diaz v. *Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000) 13
Richardson v. *Reno*, 180 F.3d 1311 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000) 15
Sandoval v. *Reno*, 166 F.3d 225 (3d Cir. 1999) 4-5
Shah v. *Reno*, 184 F.3d 719 (8th Cir. 1999) 5
Soriano, In re, Interim Dec. No. 3289, 1996 WL 426888 (A.G. Feb. 21, 1997) 4
St. Cyr v. *INS*, 229 F.3d 406 (2d Cir. 2000), petition for cert. pending, No. 00-767 ..... 5, 13, 14, 15, 16
Tasios v. *Reno*, 204 F.3d 544 (4th Cir. 2000) 5
Turkhan v. *Perryman*, 188 F.3d 814 (7th Cir. 1999) 6
United States v. *Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999), cert. denied, 121 S. Ct. 156 (2000) 7

Constitutional and statutes:

U.S. Const. Art. III 16
Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657 8
Antitierrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2
§ 401(e), 110 Stat. 1268 4
§ 440(a), 110 Stat. 1276 3
§ 440(d), 110 Stat. 1277 ..... 3, 4, 5, 6, 11, 12, 13
Controlled Substance Import and Export Act, 21 U.S.C. 951 *et seq.*:
21 U.S.C. 952(a) 9
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998) 3

Statutes—Continued: Page

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546 2
§ 304, 110 Stat. 3009-587 to 3009-593 7
110 Stat. 3009-594 7
§ 304(b), 110 Stat. 3009-597 7
§ 306, 110 Stat. 3009-607 8
§ 306(b), 110 Stat. 3009-612 8
§ 309(a), 110 Stat. 3009-625 7
§ 309(c), 110 Stat. 3009-625 8
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998) 2
8 U.S.C. 1101(a)(43)(B) 9
8 U.S.C. 1105a (1994) 8
8 U.S.C. 1105a(a) (1994) 3
8 U.S.C. 1105a(a)(10) (1994) 3, 4, 8
8 U.S.C. 1182(a) (Supp. IV 1998) 9
8 U.S.C. 1182(a)(2) (1994 & Supp. IV 1998) 8
8 U.S.C. 1182(a)(2)(A)(i)(II) (1994 & Supp. IV 1998) 2
8 U.S.C. 1182(a)(2)(C) (Supp. IV 1998) 2
8 U.S.C. 1182(c) (1994) ..... *passim*
8 U.S.C. 1227(a) (Supp. IV 1998) 9
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) 3
8 U.S.C. 1229 (Supp. IV 1998) 7
8 U.S.C. 1229a (Supp. IV 1998) 7
8 U.S.C. 1229b (Supp. IV 1998) 7
8 U.S.C. 1229b(a)(3) (Supp. IV 1998) 7, 12
8 U.S.C. 1229b(b)(1)(C) (Supp. IV 1998) 7
8 U.S.C. 1231(b)(3) (Supp. IV 1998) 10
8 U.S.C. 1231(b)(3)(A) (Supp. IV 1998) 10
8 U.S.C. 1231(b)(3)(B) (Supp. IV 1998) 10
8 U.S.C. 1231(b)(3)(B)(ii) (Supp. IV 1998) 10

Statutes—Continued: Page

8 U.S.C. 1251(a)(2)(A)(iii) (1994) 3
8 U.S.C. 1252 (Supp. IV 1998) 8
8 U.S.C. 1252(a)(1) (Supp. IV 1998) 8
8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) 8, 14, 15, 16
8 U.S.C. 1252(b)(9) (Supp. IV 1998) 8-9
18 U.S.C. 924(c) 9
28 U.S.C. 2241 ..... 4, 13, 14

Miscellaneous:

65 Fed. Reg. 44,478 (2000) 6

In the Supreme Court of the United States

No. 00-362

FERNANDO GALINDO DEL VALLE, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 213 F.3d 594. The decisions of the Board of Immigration Appeals (Pet. Supp. App. 1-2) and the immigration judge (Pet. Supp. App. 3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2000. The petition for a writ of certiorari was filed on August 23, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns amendments to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, enacted by Congress in 1996. Those amendments were designed in large part to reduce the opportunities for

criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (enacted Apr. 24, 1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996).

a. An alien may be denied admission to the United States if he has been convicted of, or admits having committed, any violation of law relating to controlled substances, 8 U.S.C. 1182(a)(2)(A)(i)(II) (1994 & Supp. IV 1998), or if an immigration officer has reason to believe that the alien has been an illicit trafficker in any controlled substance, 8 U.S.C. 1182(a)(2)(C) (Supp. IV 1998). Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation or exclusion because of a criminal conviction could apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the INA (see 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998)), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[1] If the Attorney denied relief from

---

[1] Although Section 1182(c) by its terms applied only to aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, the Second Circuit held in

deportation, then the alien could challenge that denial of relief by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (incorporating Hobbs Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341-2351 (1994 & Supp. IV 1998)). Under certain circumstances, an alien in custody pursuant to an order of deportation could seek judicial review thereof by filing a petition for a writ of habeas corpus in district court, pursuant to 8 U.S.C. 1105a(a)(10) (1994).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from deportation and the availability of judicial review of criminal aliens' deportation orders. First, on April 24, 1996, Congress enacted AEDPA into law. Section 440(d) of AEDPA amended Section 1182(c) to make certain additional classes of criminal aliens categorically ineligible for discretionary relief from deportation under that Section—including aliens who were deportable because they had been convicted of aggravated felonies. See AEDPA § 440(d), 110 Stat. 1277 (referring to 8 U.S.C. 1251(a)(2)(A)(iii) (1994) (now recodified as 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998)).

Section 440(a) of AEDPA enacted a related exception to the general availability of judicial review of deportation orders in the courts of appeals for the same classes of aliens. Section 440(a) provided that any final order of deportation against an alien who was deportable for having committed one of the disqualifying offenses,

---

Francis v. *INS*, 532 F.2d 268 (1976), that deportable aliens who had not departed from the United States and who had seven years' unrelinquished domicile in this country must also be given the opportunity to apply for relief from deportation under Section 1182(c). The Attorney General acquiesced in that decision.

including aggravated felonies, "shall not be subject to review by any court." 110 Stat. 1277. At the same time, Section 401(e) of AEDPA, entitled "ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS," repealed the previous version of 8 U.S.C. 1105a(a)(10) (1994), which had specifically permitted aliens in custody pursuant to an order of deportation to seek habeas corpus relief in district court. See 110 Stat. 1268.

On February 21, 1997, the Attorney General concluded in *In re Soriano*, Interim Dec. No. 3289, 1996 WL 426888, that the bar to granting discretionary relief under 8 U.S.C. 1182(c) (1994) that was enacted in AEDPA Section 440(d) applied to all deportation proceedings pending on the date of AEDPA's enactment, including those in which aliens had already submitted applications for relief. Numerous aliens challenged that conclusion in the federal courts, usually seeking to invoke the district courts' general habeas corpus jurisdiction under 28 U.S.C. 2241 to review their deportation orders. The courts of appeals divided as to whether the district courts retained habeas corpus jurisdiction to entertain such challenges to final orders of deportation, or whether (as the government contended) AEDPA had deprived the district courts of such jurisdiction and provided that, to the extent that judicial review of deportation orders might remain available for aliens convicted of aggravated felonies, the courts of appeals had exclusive authority to entertain such challenges.[2]

---

[2] The majority of the circuits concluded that, after AEDPA, the district courts retained habeas corpus jurisdiction to entertain statutory and constitutional challenges to deportation orders against criminal aliens. See *Goncalves* v. *Reno*, 144 F.3d 110, 118-126 (1st Cir. 1998), cert. denied, 526 U.S. 1004 (1999); *Henderson* v. *INS*, 157 F.3d 106, 118-122 (2d Cir. 1998), cert. denied *sub nom. Reno* v. *Navas*, 526 U.S. 1004 (1999); *Sandoval* v. *Reno*, 166 F.3d

The courts of appeals also reached varying conclusions about the temporal scope of AEDPA Section 440(d).[3]

225, 229-238 (3d Cir. 1999); *Bowrin* v. *INS*, 194 F.3d 483, 486-489 (4th Cir. 1999); *Requena-Rodriguez* v. *Pasquarell*, 190 F.3d 299, 305 (5th Cir. 1999); *Pak* v. *Reno*, 196 F.3d 666, 670-673 (6th Cir. 1999); *Shah* v. *Reno*, 184 F.3d 719, 722-724 (8th Cir. 1999); *Magana-Pizano* v. *INS*, 200 F.3d 603, 607-609 (9th Cir. 1999); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1142-1147 (10th Cir. 1999), cert. denied *sub nom. Palaganas-Suarez* v. *Greene*, 120 S. Ct. 1539 (2000); *Mayers* v. *INS*, 175 F.3d 1289, 1295-1300 (11th Cir. 1999). The Seventh Circuit, by contrast, concluded that AEDPA divested the district courts of that jurisdiction. See *LaGuerre* v. *Reno*, 164 F.3d 1035, 1040-1041 (1998), cert. denied, 120 S. Ct. 1157 (2000).

[3] The First, Second, Third, Sixth, Eighth, Ninth, and Eleventh Circuits concluded that AEDPA Section 440(d) did not bar relief under 8 U.S.C. 1182(c) (1994) for aliens whose deportation proceedings were commenced before AEDPA was enacted. See *Goncalves*, 144 F.3d at 126-133; *Henderson*, 157 F.3d at 129-130; *Sandoval*, 166 F.3d at 241; *Pak*, 196 F.3d at 675-676; *Shah*, 184 F.3d at 724; *Magana-Pizano*, 200 F.3d at 611; *Mayers*, 175 F.3d at 1301-1304. The Second and Fourth Circuits also held that AEDPA Section 440(d) did not bar relief for an alien who pleaded guilty to one of the offenses covered in that Section and was convicted before AEDPA was enacted, even if that alien was placed in deportation proceedings after AEDPA's enactment. See *St. Cyr* v. *INS*, 229 F.3d 406, 418 (2d Cir. 2000), petition for cert. pending, No. 00-787; *Tasios* v. *Reno*, 204 F.3d 544, 550-552 (4th Cir. 2000). The First and Ninth Circuits held that, although AEDPA Section 440(d) generally barred relief for aliens convicted before AEDPA was enacted but placed in proceedings after its enactment, it would not bar relief if an alien could show that he pleaded guilty in specific reliance on the fact that, under the state of the law before AEDPA was enacted, he might have been eligible for relief under Section 1182(c). See *Mattis* v. *Reno*, 212 F.3d 31, 37 (1st Cir. 2000); *Magana-Pizano*, 200 F.3d at 612-613. The Third, Fifth, and Tenth Circuits, by contrast, held that AEDPA Section 440(d) did bar relief for aliens who were convicted before AEDPA was enacted but were placed in deportation proceedings after its enactment. *DeSousa* v. *Reno*, 190 F.3d 175, 185-187 (3d Cir. 1999); *Requena-*

The question also arose in immigration proceedings whether AEDPA Section 440(d) barred relief under Section 1182(c) for aliens placed in exclusion proceedings as well as those placed in deportation proceedings. In *In re Fuentes-Campos*, Interim Dec. No. 3318 (May 14, 1997), the BIA held that AEDPA Section 440(d) deprived the Attorney General of authority to grant Section 1182(c) relief only to aliens who are in deportation proceedings, but left unaffected her ability to grant relief to aliens in exclusion proceedings. Several deportable aliens challenged that construction of AEDPA Section 440(d) as violative of equal protection, but five courts of appeals rejected that challenge.[4]

Rodriguez, 190 F.3d at 307-308; *Jurado-Gutierrez*, 190 F.3d at 1149-1152. And the Seventh Circuit held that AEDPA Section 440(d) barred relief even for aliens who were already in deportation proceedings when AEDPA was enacted. *Turkhan* v. *Perryman*, 188 F.3d 814, 827 (1999); *LaGuerre*, 164 F.3d at 1040-1041.

In light of that conflict in the circuits, as well as this Court's denial of certiorari in several cases presenting the temporal scope of AEDPA Section 440(d), the Attorney General recently published for notice and comment a proposed rule that would acquiesce in the decisions of those circuits that have concluded that AEDPA Section 440(d) does not bar relief for an alien who was placed in deportation proceedings before AEDPA was enacted. See 65 Fed. Reg. 44,476, 44,478 (2000). The Attorney General would still apply AEDPA Section 440(d), however, to aliens who were placed in deportation proceedings after AEDPA was enacted, even if they were convicted before its enactment, absent adverse circuit precedent. *Ibid.*

[4] See *Almon* v. *Reno*, 192 F.3d 28 (1st Cir. 1999), cert. denied, 121 S. Ct. 83 (2000); *DeSousa*, 190 F.3d at 185-187; *Requena-Rodriguez*, 190 F.3d at 308-309; *LaGuerre*, 164 F.3d at 1041; *Jurado-Gutierrez*, 191 F.3d at 1152-1153. The Ninth Circuit, in a criminal case, held that excludable criminal aliens are also barred by AEDPA Section 440(d) from eligibility for Section 1182(c) relief, and thereby avoided the constitutional equal protection question.

c. On September 30, 1996, Congress enacted IIRIRA into law. In Section 304 of IIRIRA, Congress abolished the old distinction between "deportation" and "exclusion" orders, and instituted a new form of proceeding, known as "removal." See 8 U.S.C. 1229, 1229a (Supp. IV 1998); 110 Stat. 3009-587 to 3009-593.

Section 304 of IIRIRA also refashioned the terms on which an alien found to be subject to removal may apply for relief in the discretion of the Attorney General. Congress completely repealed old Section 1182(c). See IIRIRA § 304(b), 110 Stat. 3009-597 ("Section 212(c) (8 U.S.C. 1182(c)) is repealed."). In its stead, Congress created a new form of discretionary relief, known as cancellation of removal, with new eligibility terms. See 8 U.S.C. 1229b (Supp. IV 1998); 110 Stat. 3009-594. As under AEDPA, Congress provided that aliens convicted of aggravated felonies are ineligible for discretionary relief. 8 U.S.C. 1229b(a)(3), 1229b(b)(1)(C) (Supp. IV 1998).

Because IIRIRA made sweeping changes to the system for removal of aliens, Congress delayed IIRIRA's full effective date and established various transition rules. As a general matter, Congress provided that most of IIRIRA's provisions, including the new removal procedures, the new provisions for cancellation of removal, and the repeal of Section 1182(c)—all of which were enacted together in Section 304 of IIRIRA—would take effect on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. For aliens who were placed in deportation or exclusion proceedings before that date, Congress provided that most of IIRIRA's amendments would not apply, and that such cases instead

---

See *United States* v. *Estrada-Torres*, 179 F.3d 776 (9th Cir. 1999), cert. denied, 121 S. Ct. 156 (2000).

would generally be governed by pre-IIRIRA law, including AEDPA, along with transitional rules further restricting judicial review of criminal aliens' deportation orders. See IIRIRA § 309(c), 110 Stat. 3009-625, as amended by Pub. L. No. 104-302, § 2, 110 Stat. 3657 (technical correction).

Congress also recast and streamlined the INA's provisions for judicial review of removal orders, in Section 306 of IIRIRA. For removal proceedings commenced after April 1, 1997, Congress repealed altogether the former judicial-review provisions of 8 U.S.C. 1105a (1994), which, before AEDPA, had (at subsection (a)(10)) expressly made the writ of habeas corpus available to aliens held in custody. IIRIRA § 306(b), 110 Stat. 3009-612. In its stead, Congress enacted the new 8 U.S.C. 1252 (Supp. IV 1998), which reestablished the traditional rule that final orders of removal are subject to judicial review only on petition for review in the courts of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998) (incorporating Hobbs Act). Congress also restricted judicial review of removal orders entered against criminal aliens by providing that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" one of various criminal offenses, including any criminal offense covered in Section 1182(a)(2). See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). And Congress enacted a new, sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(b)(9) (Supp. IV 1998), which provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any

> action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section [*i.e.*, Section 1252].

2. Petitioner is a native and citizen of Colombia who became a legal permanent resident on November 29, 1969. Pet. Supp. App. 1. On December 18, 1981, after a guilty plea, petitioner was convicted in federal district court of importation of methaqualone, in violation of 21 U.S.C. 952(a), and was sentenced to five years' imprisonment. See Certified Administrative Record (C.A.R.) 56.[5] That offense is an "aggravated felony" under the INA. See 8 U.S.C. 1101(a)(43)(B) (drug trafficking crimes).[6]

On August 30, 1998, petitioner sought to return to the United States from a trip abroad. See C.A.R. 78. An immigration officer denied him admission, however, based on his drug-trafficking conviction, and on September 17, 1998, the INS initiated removal proceedings against petitioner based on that conviction. *Ibid.*[7]

---

[5] Petitioner was released on parole on August 8, 1984, and was discharged from federal custody on April 19, 1986. C.A.R. 57-58.

[6] Section 1101(a)(43)(B) defines the term "aggravated felony" to include "a drug trafficking crime (as defined in section 924(c) of title 18)." Section 924(c) of Title 18, in turn, defines "drug trafficking crime" to include "any felony punishable under * * * the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.)." That definition includes petitioner's offense for importation of methaqualone.

[7] Because petitioner was denied admission when seeking to return to the United States from a trip abroad, the INS charged him with inadmissibility under 8 U.S.C. 1182(a) (Supp. IV 1998) rather than deportability under 8 U.S.C. 1227(a) (Supp. IV 1998). Petitioner does not challenge that decision. The distinction is pertinent in some cases because a conviction for an "aggravated

Petitioner conceded his inadmissibility based on that conviction. *Id.* at 44. The immigration judge concluded that petitioner was ineligible for any form of relief from removal because of his drug-trafficking conviction, *id.* at 51, and ordered him removed from the United States, *id.* at 30.

The BIA dismissed petitioner's appeal. Pet. Supp. App. 1-2. In particular, the BIA noted that petitioner had been convicted of an aggravated felony, and that he was therefore ineligible for withholding of removal under 8 U.S.C. 1231(b)(3) (Supp. IV 1998).[8] The BIA did not specifically address petitioner's eligibility for either discretionary cancellation of removal under 8 U.S.C. 1229b(a) (Supp. IV 1998) or discretionary relief from deportation under old 8 U.S.C. 1182(c) (1994), which, as discussed above p. 7, *supra*), had been repealed by Section 304 of IIRIRA.

3. Petitioner filed a petition for review of his removal order in the court of appeals. Petitioner argued that he was eligible for discretionary relief from depor-

---

felony" as such is not made a specific basis for denying an alien admission under the INA. The same conviction may, however, be a ground for denying an alien admission, as in this case, where the conviction is for a drug-trafficking offense.

[8] Petitioner had sought to argue that his life or freedom would be threatened if he were returned to Colombia, and therefore his removal should be withheld under 8 U.S.C. 1231(b)(3)(A) (Supp. IV 1998). Under Section 1231(b)(3)(B)(ii), however, an alien may not be granted withholding of removal if he was been convicted of a "particularly serious crime," and Section 1231(b)(3)(B) further provides that an alien who has been convicted of an aggravated felony who has been sentenced to a term of imprisonment of at least five years shall be considered to have committed a "particularly serious crime." As noted above (p. 9, *supra*), petitioner was convicted of an aggravated felony and received a sentence of five years' imprisonment.

tation under old Section 1182(c). He contended further that Congress's amendment to Section 1182(c) in AEDPA Section 440(d) to make that form of relief unavailable to any alien convicted of an aggravated felony should not be applied to his case because his conviction for importation of methaqualone predated Congress's enactment of AEDPA. See Pet. C.A. Br. 5-8.

The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 7. The court noted that petitioner had not challenged the constitutionality of IIRIRA's complete repeal of Section 1182(c), but had challenged only the purported application to his case of AEDPA Section 440(d), which made Section 1182(c) relief unavailable to aliens convicted of aggravated felonies who were placed in deportation proceedings. *Ibid.* The court concluded, however, that petitioner had no basis to challenge AEDPA Section 440(d)'s restriction of Section 1182(c) relief because Section 1182(c) was completely inapplicable to his removal proceeding; that proceeding had been commenced after the effective date of IIRIRA, which repealed Section 1182(c) entirely. As the court of appeals explained, "AEDPA § 440(d) was not applied to [petitioner] to bar [Section 1182(c)] relief because [Section 1182(c)] has been repealed. Thus [petitioner] cannot show an injury from the application of AEDPA § 440(d)." *Ibid.*

DISCUSSION

1. Petitioner seeks to renew his contention (Pet. 4) that AEDPA Section 440(d) should not be applied to his case to bar him from receiving relief from deportation under 8 U.S.C. 1182(c) (1994). Petitioner acknowledges that "[t]he permanent rules of IIRIRA repealed [Section 1182(c)] in its entirety," Pet. 4, but he contends

that "IIRIRA merely continued the elimination of [Section 1182(c)] relief already in effect for aliens convicted of drug offenses," *ibid.*

The court of appeals correctly concluded, however, that AEDPA Section 440(d) is irrelevant to petitioner's case. Petitioner was ineligible for relief under Section 1182(c), not because relief under that provision had been restricted under AEDPA, but because relief under that provision no longer existed for any alien in removal proceedings (such as petitioner's) that were commenced after the effective date of IIRIRA, April 1, 1997. Thus, petitioner was not injured by AEDPA Section 440(d)'s restriction of Section 1182(c) relief for aliens deportable because of aggravated felony convictions.[9] Moreover, petitioner is ineligible for discretionary cancellation of removal under 8 U.S.C. 1229b(a)(3) (Supp. IV 1998), which provides that such relief shall not be afforded to an alien convicted of an aggravated felony.

---

[9] Indeed, it is quite possible that had Section 1182(c) been relevant to petitioner's case—in particular, if he had been placed in proceedings before the effective date of IIRIRA—then AEDPA Section 440(d) would not have barred him from eligibility for such relief. As we have noted, petitioner was placed in removal proceedings when he returned to the United States from a trip abroad. Had petitioner taken that trip abroad and returned to the United States before the effective date of IIRIRA, and had he been denied permission to enter at a port of entry because of his narcotics offense, he might well have been placed in exclusion rather than deportation proceedings. In that circumstance, petitioner would have remained eligible for a waiver of inadmissibility under Section 1182(c), because the BIA determined in *Fuentes-Campos*, *supra*, that AEDPA Section 440(d) did not apply to aliens placed in exclusion proceedings when they sought to return to the United States from a trip abroad. See p. 6, *supra*.

The Eleventh Circuit's conclusion that petitioner lacked standing to challenge AEDPA Section 440(d) in his case is premised on its conclusion that Section 1182(c) was entirely repealed by IIRIRA and has no application in removal proceedings commenced after the effective date. That conclusion, however, conflicts with decisions of the Second and Ninth Circuits. In *St. Cyr* v. *INS*, 229 F.3d 406 (2000), petition for cert. pending, No. 00-767, the Second Circuit concluded that IIRIRA's repeal of Section 1182(c) does not apply to any alien who was convicted based on a guilty plea entered before the effective dates of AEDPA and IIRIRA and who would have previously been eligible for relief under Section 1182(c), and that to apply the repeal to such cases would contravene the presumption against retroactive application of federal statutes. *Id.* at 417-421. In *Richards-Diaz* v. *Fasano*, No. 99-56530, 2000 WL 1715956 (Nov. 17, 2000), the Ninth Circuit concluded that, although IIRIRA's repeal of Section 1182(c) generally applies in all removal proceedings commenced after the effective date of IIRIRA, even for aliens whose convictions were entered before that date, a "limited exception" exists for an alien who can show that he entered a guilty plea before the effective date of IIRIRA in specific reliance on the fact that, under the state of the law at the time he pleaded guilty, he was eligible for consideration for discretionary relief from deportation. See *id.* at *4.

Because of that conflict in the circuits, and because of the importance of the issue to the administration of the INA, we have filed a petition for a writ of certiorari in *St. Cyr*, seeking review of the Second Circuit's decision on the merits, as well as the Second Circuit's ruling that district courts may exercise habeas corpus jurisdiction under 28 U.S.C. 2241 to review a final order of removal

(see pp. 14-16, *infra*).[10] If the Court reaches the merits issue in *St. Cyr* and concludes that relief under Section 1182(c) does remain available for at least some aliens who were placed in removal proceedings after IIRIRA became effective but who were convicted before that date, then the underlying premise of the court of appeals' decision in this case will no longer be valid. Accordingly, we suggest that the Court hold the petition in this case pending its disposition of *St. Cyr*.

2. In *St. Cyr*, we have also sought review of the Second Circuit's holding that an alien removable because of an aggravated felony conviction and therefore barred from obtaining judicial review of his final removal order directly in the court of appeals under 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) may present statutory and constitutional challenges to his removal order in the district court, invoking the district court's habeas corpus jurisdiction under 28 U.S.C. 2241. See 00-767 Pet. 17-26. In its decision in *St. Cyr*, the Second Circuit relied (229 F.3d at 409-410) on its decision in *Calcano-Martinez* v. *INS*, No. 98-4033, 2000 WL 1336611 (Sept. 1, 2000), in which it concluded (at *8-*16) that an alien who is removable because of a criminal conviction referred to in Section 1252(a)(2)(C) may not present, on petition for review in the court of appeals, a challenge to his final removal order based on the contention that a statute denying him eligibility for discretionary relief should not be applied "retroactively" to his case. The Second Circuit concluded in *St. Cyr* that, under its decision in *Calcano*, the court of appeals could not entertain on petition for review St. Cyr's challenge to his final removal order on that basis, but it

---

[10] We are providing petitioner with a copy of our certiorari petition in *St. Cyr*.

also concluded, based on its decision in *Calcano*, that the complete denial of any judicial forum to entertain that challenge would raise serious constitutitional concerns about the suspension of habeas corpus. See 229 F.3d at 410-411. The court therefore permitted St. Cyr to proceed in district court by way of habeas corpus. *Id.* at 411.

The Second Circuit's jurisdictional ruling in *St. Cyr* conflicts with decisions of the Fifth and Eleventh Circuits, which have held that IIRIRA deprived the district courts of jurisdiction to entertain criminal aliens' challenges to their final removal orders. See *Max-George* v. *Reno*, 205 F.3d 194, 198 (5th Cir. 2000), petition for cert. pending, No. 00-6280; *Richardson* v. *Reno*, 180 F.3d 1311, 1315 (11th Cir. 1999), cert. denied, 120 S. Ct. 1529 (2000).[11] Because of that conflict in the circuits, as well as the importance of the issue, we have also sought review of the Second Circuit's jurisdictional decision. The resolution of that jurisdictional issue in *St. Cyr* may well affect the federal courts' jurisdiction to hear petitioner's claim in this case. Petitioner is an alien whose conviction is in a category referred to in the preclusion of judicial review in Section 1252(a)(2)(C). It would appear, therefore, that, under the Second Circuit's decisions in *Calcano* and *St. Cyr*, a court of appeals should not have jurisdiction to entertain petitioner's challenge to his removal order. We agree with the Second Circuit that an alien whose conviction is covered by Section 1252(a)(2)(C) may not present on petition for review a claim that a statute barring the

---

[11] Related jurisdictional issues are also presented in pending certiorari petitions in *Zalawadia* v. *Reno*, No. 00-268; *Obajuluwa* v. *Reno*, No. 00-523; *Rodriguez* v. *INS*, No. 00-753; and *Russell* v. *Reno*, No. 00-5970.

Attorney General from granting him discretionary relief from removal does not apply "retroactively" to his case. We do not agree with the Second Circuit, however, that such an alien may present the same claim in district court on habeas corpus. See 00-767 Pet. at 25-26. It appears likely, however, that if the Court grants certiorari in *St. Cyr*, its resolution of the issue of habeas corpus jurisdiction in that case will require it to examine the scope of the preclusion of review of the court of appeals' jurisdiction in Section 1252(a)(2)(C). Accordingly, because the Court's resolution of the jurisdictional issue in *St. Cyr* may determine whether the court of appeals could exercise jurisdiction over the petition in this case (even setting aside the Article III standing problem), we suggest that the Court also hold the petition in this case for its disposition of the jurisdictional issue in *St. Cyr*.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition for a writ of certiorari in *INS* v. *St. Cyr*, No. 00-767, and then disposed of as appropriate in light the Court's action in that case.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DONALD E. KEENER
MICHAEL T. DOUGHERTY
Attorneys

DECEMBER 2000